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Tort Liability of Manufacturers

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lay stress upon the substance and not the form of the transaction. If, in the particular transaction, the corporation has the requisite authority to extend its credit outright, it may do so indirectly, and the extension of credit may take any form.⁸⁴ In cases where there is doubt as to whether the corporation was directly interested in the transaction, business custom operates as a make-weight factor.⁸⁵ Stockholders and creditors of corporations cannot be heard to complain that this practice exposes them to undue risks. If the character of the corporate officers does not afford the desired protection, such protection may be obtained in the form of a surety bond.

4. The enactment of remedial legislation has been postponed by the adoption of the *direct benefit theory*.

HAROLD PELLER.

TORT LIABILITY OF MANUFACTURERS.

The doctrine of liability of manufacturers to remote purchasers and users of articles, who have suffered injury therefrom, has found a permanent place in our jurisprudence. There can be no question of the fact that manufacturers are in some cases liable to the consumer, whether the latter is in privity of contract with the manufacturer or not. The difficult problem is unfolded in an attempt to determine the extent of the liability and to establish principles which will enable us to forecast when a manufacturer will be held liable to a remote consumer, and when he will be relieved of such liability.

There is little or no question concerning the manufacturer's liability to one who purchases directly from him. His liability in such a case is established simply by showing a warranty, either express or implied, or some negligence in the manufacture of the article which resulted in harm to the purchaser. When such a situation arises the problem is elementary. On proof of the breach of the warranty or of the duty to use care the manufacturer is held liable.

The law is not nearly so well settled when the plaintiff has not purchased directly from the manufacturer but from a retailer, who may have bought from the manufacturer, or from a wholesale distributor. The early cases brought into our law the proposition that privity of contract is necessary to recover in tort against the maker of a chattel. *Winterbottom v. Wright*¹ is generally regarded as the first case to

⁸⁴ Cf. Rabatt, *Power of Corporations to Execute Guaranties* (1897) 33 AM. L. R. 363.

⁸⁵ Wheeler, *Osgood & Co. v. Everett Land Co.* 14 Wash. 630, 45 Pac. 316 (1896); (1926) 30 YALE L. J. 89.

¹ 10 M. & W. 109 (1842) (The plaintiff driver of a stage coach sought to recover from a contractor who had agreed with a third party to keep the stage

set forth this principle. So firmly did this notion fix itself that today we are just completing the process of liberating our law from it.

The rule had scarcely been announced before it was qualified by a series of exceptions. A scant ten years later came *Thomas v. Winchester*² which announced an important exception to the privity rule. In 1903, *Huset v. J. I. Case Threshing Machine Co.*³ set forth the important exceptions thus:

"The first (exception) is an act of negligence of a manufacturer or vendor which is *imminently dangerous* to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life, is actionable by third persons who suffer from the negligence * * *. The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises, may form the basis of an action against the owner * * *. The third exception to the rule is that one who sells or delivers an article without notice of its qualities is liable to any person who suffers an injury therefrom which might reasonably have been anticipated, whether there were any contractual relations between the parties or not."⁴ (Italics ours.)

in repair, for injuries sustained when the stage broke down. Recovery was denied because there was no privity of contract. The case has often been cited as authority for the proposition that privity of contract is necessary for recovery in tort against the maker of a chattel.)

Bohlen, in his article on *Affirmative Obligations in the Law of Torts* (1905) 53 U. OF PA. L. REV. 280, criticizes the proposition claiming that the case is not in point. While there is much justification for the point of view adopted by Bohlen, the principle has been too firmly established to be easily overthrown.

² 6 N. Y. 397 (1852) (The defendant dealer in drugs carelessly labelled belladonna, a deadly poison, as extract of dandelion, a harmless medicine. The medicine was purchased from a retail dealer, who bought it from the defendant, by the plaintiff, whose wife suffered serious consequences therefrom. The plaintiff was permitted to recover in spite of the fact that he had never been in privity of contract with the defendant. The court said, "Where the act of negligence is imminently dangerous to the lives of others, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not. If the act of negligence is not inherently dangerous to the lives of others, the negligent party is liable only to the party with whom he contracted.")

See also *Norton v. Sewall*, 106 Mass. 143 (1870) (sale of laudanum for rhubarb); *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. 190 (1902) (sale of saltpeter for epsom salts). But cf. *Loop v. Litchfield*, 42 N. Y. 351 (1870) (a fly-wheel is not imminently dangerous), and *Losee v. Clute*, 51 N. Y. 494 (1873) (manufacturer not liable when a boiler exploded). The latter two cases have been severely criticized.

³ 120 Fed. 865 (C. C. A. 8th, 1903) (The plaintiff's employer had purchased a thresher made by the defendant. The plaintiff was injured when the belt on which he was properly standing collapsed. This occurred on the first day the thresher was put in use. The court decided that a thresher was not an inherently dangerous article but dismissed a demurrer because the plaintiff had alleged that the defendant knew of the defect.)

⁴ It is interesting to note Judge Sanborn's reasoning in this case. He did not attempt to explain all the earlier cases on the inherently dangerous principle

Obviously, these exceptions greatly increase the liability of manufacturers. It is well to remember that under the reasoning of this case the manufacturer's liability rests on a contractual relationship between him and the injured party, and that these exceptions make the manufacturer liable without such privity only in rare cases.⁵

It remained for the case of *MacPherson v. Buick*,⁶ the leading case on the subject of manufacturer's liability, to point out the fallacy in the imminently dangerous theory and the illusory distinction on which it was based. It was Judge Cardozo who called to judicial attention the fact that chattels are not in and of themselves dangerous except in the rarest cases, such as explosives, poisons, etc., and that the test should be: how dangerous is the chattel with the defect caused in the manufacture? In that case the defendant, an automobile manufacturer, sold a car to a retail dealer who sold it to the plaintiff. While the plaintiff was in the car it suddenly collapsed and the plaintiff was injured. One of the wheels was made of defective wood. The wheel had not been manufactured by the defendant; it was bought from

and failed to classify the defective ladder case, *Devlin v. Smith*, 89 N. Y. 470 (1882). His reason for refusing to discard the privity rule has been carried down almost to the most recent cases: "For the reason that a wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines which are to be operated or used by the intelligent and the ignorant, the skillful and the incompetent, the watchful and the careless, parties that cannot be known to the manufacturers or vendors and who use the articles all over the country hundreds of miles distant from the place of their manufacture or original sale, a general rule has been adopted and has become established by repeated decisions of the courts of England and this country that in these cases the liability of the contractor or manufacturer for negligence in the construction or sale of the articles is limited to the persons to whom he is liable under the contracts of construction or sale."

⁵Modern text writers, with few exceptions, state the rule *contra* this case today, holding a manufacturer liable for his negligence even in the absence of contractual relationships. HARPER, in his *TREATISE ON THE LAW OF TORTS* (1933) § 106, says, "The modern tendency is to look at the relationship of the parties, not their contract." BURDICK, *THE LAW OF TORTS* (4th ed. 1926) § 475, also states the rule affirmatively, "The law has so developed in recent years that it is generally held today that a manufacturer of inherently dangerous articles is liable to anyone who is injured as a result, though he be not in privity of contract, and this is true though the article gets its dangerous character only as a result of a latent defect due to the defendant's fault."

Cooley's statement of the rule is particularly interesting because it reflects the radical change in the state of the law on this subject in the past three decades. 2 COOLEY, *TORTS* (3d ed. 1906) p. 1486. "The general rule is that a contractor, manufacturer, vendor or furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of such articles." Some cases, too, still speak of exceptions to the privity rule. *Kalash v. Los Angeles Ladder Co.*, 1 Cal. (2d) 229, 34 P. (2d) 481 (1934); *Nehi Bottling Co. v. Thomas*, 236 Ky. 684, 33 S. W. (2d) 701 (1930); *Crane Co. v. Sears*, 168 Okla. 603, 35 P. (2d) 916 (1934).

THE RESTATEMENT OF THE LAW OF TORTS has discarded the privity rule and is in line with the modern cases. See §§ 394-399.

⁶217 N. Y. 382, 111 N. E. 1050 (1916).

another manufacturer. There was evidence, however, that the defendant could have discovered the defect by reasonable examination, but the defendant had neglected to do so. In deciding the case in favor of the plaintiff, Judge Cardozo laid down the following principle:

"A manufacturer owes the affirmative obligation to employ reasonable care in the manufacture or assembling of chattels which, while not necessarily dangerous if properly constructed, constitute a menace to life and limb if not properly made; and this duty is owed not only to his immediate vendee, but to *anyone* likely to be harmed by the defective article while the same is being lawfully used for the purpose intended."⁷ (*Italics ours.*)

The decision is a departure from the early contractual relationship theory as a basis for recovery in tort.⁸ Judge Cardozo imposed a duty on the manufacturer to exercise due care in the making of his chattel, the omission of which will be followed by liability to any person who can prove himself to have been injured as a legal consequence of the manufacturer's omission. It marks the beginning of a new determination of liability, to wit: how dangerous is the article with the defect, instead of the previous imminently dangerous theory.

The *MacPherson* case⁹ has proved itself the chief weapon in the attack on the privity rule. On the points it decided it has become the leading case in the country. It left open, however, four questions: (1) should protection be extended to property interests? (2) should protection be extended to bystanders injured by the chattel? (3) should protection be extended to those injured by minor batteries? and (4) should the manufacturer of the defective part be held liable?¹⁰ These questions have been decided differently in various jurisdictions and we are not impelled to say, as one writer has,¹¹ that all of them have been answered in the affirmative.

The rule in regard to property generally, is that if the article when defective is imminently dangerous to human life as well as to property, recovery for property damage will be permitted.¹² These

⁷ *Id.* at 388.

⁸ *Id.* at 390.

Judge Cardozo said: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

⁹ 217 N. Y. 382, 111 N. E. 1050 (1916).

¹⁰ See notes 11, 13, 14, *infra*, for cases pointing out these questions.

¹¹ Note (1937) 4 U. OF CHI. L. REV. 461.

¹² New York has reserved this question: *Pine Grove Poultry Farm Co. v. Newman By-Products Mfg. Co.*, 248 N. Y. 293, 162 N. E. 84 (1922). The leading case on the subject of recovery for property damage is *Windram Mfg. Co. v. Boston Blacking Co.*, 239 Mass. 123, 131 N. E. 454 (1921). But *cf.* *G. O. P. Fire Ass'n v. Sonnenborn*, 263 N. Y. 463, 189 N. E. 551 (1934) (manufacturer was liable for property damage resulting when he failed to give notice of the dangerous characteristics of a liquid preparation).

decisions proceed on the theory that the manufacturer has breached a duty to the public and the resultant damage is immaterial. But where the article, if defective, will prove dangerous to property alone courts are loathe to extend the rule.¹³ They have generally been unwilling to grant recovery for minor batteries, although they have in some instances done so.¹⁴ The manufacturer of the defective part is also held liable in this state in decisions after the *MacPherson* case.¹⁵ In this state, also, the question as to whether or not recovery would be permitted to a bystander was settled in the affirmative in the *Kalinowski* case.¹⁶

Modern text writers have been loathe to relinquish the privity rule. In spite of the declarations of the *MacPherson* case¹⁷ and those which followed in rapid succession, there are writers who still state, as an original proposition, that the manufacturer is not liable in the absence of contractual relations with the parties injured, and then state the established exceptions to the rule. It is to be noted that these writers are in the minority and that their statement of the rule is against the weight of authority.¹⁸

Our concern, therefore, in regard to the more recent cases, is with the exceptions to the privity doctrine rather than the rule itself. Harper¹⁹ has included five main exceptions. Briefly stated, they are to the effect that the manufacturer is liable to the remote vendee:

¹³ For a discussion of property damage in general see Feezer, *Tort Liability of Manufacturers and Vendors* (1925) 10 MINN. L. REV. 1. For economic loss due to negligent misrepresentation, see *Ultramares Corp. v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931).

¹⁴ Recovery allowed for slight battery: *Slavin v. Francis H. Leggett & Co.*, 114 N. J. L. 421, 177 Atl. 120 (1935); *contra*, ostensibly on other grounds, *Jaroniec v. C. O. Hasselbarth*, 131 Misc. 314, 228 N. Y. Supp. 947 (1932). Recovery denied for slight battery: *Byers v. Flushovalve Co.*, 160 N. Y. Supp. 1050 (1916); *Spiegel v. Libby, McNeil & Libby, Inc.*, 137 Misc. 698, 244 N. Y. Supp. 654 (1930); *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157 (1907).

¹⁵ *Smith v. Peerless Glass Co.*, 233 App. Div. 252, 251 N. Y. Supp. 708 (2d Dept. 1931), *aff'd*, 259 N. Y. 292, 181 N. E. 576 (1932) (Manufacturer of a carbonated soda bottle was liable for injuries to the remote consumer resulting from an explosion where the bottle was defective and inspection thereof was inadequate. The bottle manufacturer owed a duty of adequate inspection.)

¹⁶ *Kalinowski v. Truck Equipment Co.*, 237 App. Div. 472, 261 N. Y. Supp. 657 (4th Dept. 1933) (The defendant truck company rebuilt a truck, installing a new rear axle and a new rear wheel. While the truck was being driven by the owner the rear axle broke, and the wheel mounted the curb to the sidewalk and injured the plaintiff. It was held that the jury should be permitted to say whether or not the injury to the plaintiff was in "immediate sequence" with the breaking of the axle and whether the "hazard that ensued" to the plaintiff was a "hazard to be avoided" by the defendant truck company.)

THE RESTATEMENT OF THE LAW OF TORTS provides for situations which might arise similarly to that in the *Kalinowski* case by inserting the words "or in the vicinity of its probable use" in connection with the liability of manufacturers. § 395 and those following.

¹⁷ 217 N. Y. 382, 111 N. E. 1050 (1916).

¹⁸ See note 5, *supra*.

¹⁹ TREATISE ON THE LAW OF TORTS (1922) § 106.

when the article is known to be dangerous; when the article sold, while not dangerous if properly constructed, would be a menace if not carefully made; when there is negligence in manufacturing the chattel even if there is a duty on the part of some other person (such as the immediate vendee) to inspect the chattel; and, finally, the theory of implied warranty of fitness for use, which is applied in food cases, and which imposes liability without fault.

The first exception to the privity rule (when the article is known to be dangerous) goes back to the imminently dangerous doctrine as set forth in the *Huset* case.²⁰ This rule applies when the manufacturer knows of the danger or should have known of it.²¹ In such a case he is liable to anyone who is injured by his breach of duty, whether in privity with him or not. In the *Guinan* case²² the defendant delivered some scrap film to a brush manufacturer who took it into a train and set it close to a heater where it exploded and injured a passenger. The court held that since the defendant's agents knew of the inflammable character of the film and did not tell the person to whom it was delivered the defendant was liable. Liability in the *Guinan* case²³ was predicated on the fact that the defendant was guilty of affirmatively misleading the deliverer when he failed to warn him of the danger, making him think the film was safer than it was.²⁴ When the article is dangerous because its contents are unknown, as in the case of patent medicines which are manufactured through secret formulae, the manufacturer has a duty to give reasonable instructions or warning to render the use of the medicine reasonably safe.²⁵ The fact that this exception has been recognized by

²⁰ 120 Fed. 865 (C. C. A. 8th, 1903).

²¹ *Rosebrock v. General Electric Co.*, 236 N. Y. 227, 140 N. E. 571 (1923); *Sider v. General Electric Co.*, 236 N. Y. 64, 143 N. E. 792 (1924); *Cahill v. Inecto*, 208 App. Div. 191, 203 N. Y. Supp. 1 (1st Dept. 1929).

²² *Guinan v. Famous-Players Lasky Corp.*, 267 Mass. 501, 167 N. E. 235 (1930).

²³ *Ibid.*

²⁴ In this connection see also *Ives v. Weldon*, 114 Iowa 476, 87 N. W. 408 (1901); *Farley v. Tower Co.*, 271 Mass. 230, 171 N. E. 639 (1930); *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1925).

THE RESTATEMENT OF THE LAW OF TORTS § 394 provides that the manufacturer of chattels which he knows to be dangerous for use is liable unless he warns of danger when the user was as intended.

²⁵ *G. O. P. Fire Ass'n v. Sonnenborn*, 263 N. Y. 463, 189 N. E. 551 (1934); *Blood-Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118 (1889); *Roberts v. Anheuser-Busch Brewing Ass'n*, 211 Mass. 449, 98 N. E. 95 (1912); *Norton v. Sewall*, 106 Mass. 143 (1870); *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971 (1898).

THE RESTATEMENT OF THE LAW OF TORTS § 397 provides: "A manufacturer of a chattel which is compounded under a secret formula or under a formula which although disclosed should be recognized as unlikely to be understood by those whom he should expect to use it lawfully, is subject to liability for bodily harm caused to them and persons in the vicinity of its probable use by his failure to exercise reasonable care to adopt such a formula and to bring to the knowledge of those who are to use the chattel such directions as will make it reasonably safe for the use for which it was put out."

jurists for a considerable period of time is seen by the comparatively early dates of the cases.²⁶

The second exception to the privity rule (manufacturer is liable when the article sold is known to be dangerously defective) is directly in line with the *Huset* case.²⁷ The manufacturer is not liable when he has exercised proper care and injury results from negligence or improper use of the article.²⁸ Neither manufacturer nor seller can be liable when there is no showing that either knew of the defect, or ought to have known of it, or could have ascertained it with reasonable diligence.²⁹ In this connection it is not necessary for the defendant to have actual knowledge of the concealed defect. It is sufficient if in the exercise of reasonable care the defect could have been discovered.³⁰ In respect to a dealer the rule is otherwise in the absence of warranty or representation.³¹

The third exception to the privity rule (manufacturer is liable when the article is not inherently dangerous but is dangerous with the defect) is illustrated by *MacPherson v. Buick*.³² The *MacPherson* case³³ clearly points out that an automobile with a defective wheel is a dangerous instrumentality. There is no difficulty when the article in question is similar to an automobile, for then the possibilities of injury, when it is defective, are clearly seen. The rule becomes beset with difficulties of construction when we attempt to classify what articles will be dangerous when defective in particular ways. The declarations of our courts as to what is and what is not dangerous are often difficult to reconcile. Some articles which have been adjudicated dangerous when defective are aerated bottle,³⁴ toy air gun,³⁵ floor

²⁶ See note 25, *supra*.

²⁷ 120 Fed. 865 (C. C. A. 8th, 1903).

²⁸ *Faro v. Remington Arms Co.*, 67 App. Div. 414, 73 N. Y. Supp. 787 (3d Dept. 1902), *app'l dism'd*, 173 N. Y. 600, 66 N. E. 1107 (1903).

²⁹ *Miller v. Steinfeld*, 174 App. Div. 337, 160 N. Y. Supp. 227 (3d Dept. 1915).

³⁰ *Krahn v. J. L. Owens Co.*, 125 Minn. 33, 145 N. W. 626 (1914); *Button v. Otis Elevator Co.*, 68 Utah 85, 249 Pac. 437 (1926); *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1925).

³¹ *Pearlman v. Garrod Shoe Co., Inc.*, 276 N. Y. 172, 11 N. E. (2d) 718 (1937) (The plaintiff took her infant daughter to the retail shoe store of the defendant to purchase a pair of shoes. The plaintiff informed the salesman that she was very careful of the shoes her child wore because the latter was being trained for a career as a professional dancer. The shoes thus purchased caused a blister on the child's foot and the plaintiff returned with them. The shoes were in reality faultily constructed but the salesman told the plaintiff that they were a perfect fit and merely bound up the blister. The plaintiff was successful in her prosecution of this death action after the child died as a result of the injury.)

³² 217 N. Y. 382, 111 N. E. 1050 (1916).

³³ *Ibid.*

³⁴ *Torgesen v. Schultz*, 192 N. Y. 156, 84 N. E. 956 (1908).

³⁵ *Herman v. Markham Air Rifle Co.*, 258 Fed. 475 (E. D. Mich. 1918).

stain,³⁶ coffee urn,³⁷ elevator,³⁸ automobile,³⁹ boiler,⁴⁰ scaffold,⁴¹ and lye in a cake of soap.⁴² Articles not dangerous when defective are: needle in soap,⁴³ steel blade imbedded in a cigarette,⁴⁴ mattress,⁴⁵ and door handle.⁴⁶ The manufacturer is, in these cases, held to the affirmative duty of using reasonable care to insure the reasonable suitability of the article for the use for which it was intended, and any negligence on the part of his servants or employees in the course of manufacture and construction is a breach of the defendant's duty.⁴⁷

The fourth exception makes the manufacturer liable for the negligent construction of chattels even if his immediate vendee or some other person had the opportunity or was under a duty to inspect the chattel, and the defect should have been discovered by such inspection.⁴⁸ The failure to inspect may make a third party liable but will not relieve the defendant manufacturer, whose negligence was responsible for the defect in the first place.⁴⁹

The final exception to the rule that manufacturers are not liable to those not in privity is the situation involving food. In food cases an entirely different principle is adopted. The theory that all food is impliedly fit for human consumption has been applied, and, according to the weight of authority, this implied warranty extends to the remote

³⁶ *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N. E. 474 (1915).

³⁷ *Statler v. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063 (1909).

³⁸ *Berg v. Otis Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1925).

³⁹ *Ford Motor Co. v. Livesay*, 61 Okla. 231, 160 Pac. 901 (1916).

⁴⁰ *Laudeman v. Russel & Co.*, 46 Ind. App. 32, 91 N. E. 822 (1909).

⁴¹ *Devlin v. Smith*, 89 N. Y. 470 (1882).

⁴² *Armstrong Packing Co. v. Clem* (Tex. Civ. App. 1912) 151 S. W. 576.

⁴³ *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157 (1909).

⁴⁴ *Block v. Liggett & Myers Tobacco Co.*, 162 Misc. 325, 296 N. Y. Supp. 922 (1937).

⁴⁵ *Jaroniec v. Hasselbarth, Inc.*, 223 App. Div. 182, 228 N. Y. Supp. 302 (3d Dept. 1928).

⁴⁶ *Cohen v. Brockaway*, 240 App. Div. 18, 268 N. Y. Supp. 545 (1st Dept. 1934).

⁴⁷ In this connection, the RESTATEMENT OF THE LAW OF TORTS § 395 provides: "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it was manufactured, and to those to whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it was manufactured."

⁴⁸ In *Rosebrock v. General Electric Co.*, 236 N. Y. 227, 140 N. E. 571 (1923), the testator was killed in a power station explosion. The defendant was a manufacturer of transformers. The plaintiff sought to recover on the ground that the transformers were packed with wood, that the presence of the wood was dangerous, that the defendant failed to give notice of that fact and that the presence of the wooden blocks resulted in the death of the testator. The court charged that if the transformers were customarily packed as these were then the defendant was not obliged to warn of their dangerous nature, but if it was not a general practice then the defendant was under an obligation to warn. The charge was sustained.

⁴⁹ This is a simple tort proposition.

vendee and imposes liability without fault.⁵⁰ The same rule has been applied to candy,⁵¹ beverages,⁵² and tobacco.⁵³ It should be noted, however, that the New York Court of Appeals has adopted the contrary viewpoint and prevents recovery by the ultimate consumer in the absence of privity of contract.⁵⁴ By its refusal to adopt the majority view which is obviously sound, the New York courts have placed themselves in a position which merits the severe criticism directed at them.⁵⁵

Even a casual glance at these exceptions to the privity rule seems to substantiate the contention that the exceptions rather than the original rule apply today. There is no question but that the original *MacPherson* doctrine has been extended and applied in many situations far removed from those for which it was originally invoked. The handle of a coffee urn is a far cry from a defective wheel on an automobile, as pointed out by Chief Justice Crane of the New York Court of Appeals in his caustic dissent in the recent *Hoenig v. Central Stamping Co.* case.⁵⁶

In spite of the fact that the law on the subject is still accompanied by seeming inconsistencies, we may say that the increasing tendency to hold the manufacturer liable has been accompanied by certain well-defined principles on which liability is based. As long as a probability rather than a mere possibility of danger to life and limb exists, which is caused by the defendant's negligence, recovery will be sustained against the manufacturer when the harm is substantial. In this way we can reconcile the recent decisions holding a manufacturer not liable for a defective door handle on a car⁵⁷ or for a steel blade imbedded in a cigarette,⁵⁸ with that holding a manufac-

⁵⁰ HARPER, TREATISE ON THE LAW OF TORTS (1933) § 106.

⁵¹ *Brown Cracker & Candy Co. v. Jansen* (Tex. Civ. App. 1930) 32 S. W. (2d) 227.

⁵² *Culbertson v. Coca Cola Bottling Co.*, 157 S. C. 352, 154 S. E. 424 (1930).

⁵³ *Pillars v. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918).

⁵⁴ *Chysky v. Drake*, 235 N. Y. 468, 139 N. E. 578 (1923).

⁵⁵ See WHITNEY, LAW OF SALES (2d ed. 1934) § 175 for a discussion of this criticism.

⁵⁶ *Hoenig v. Central Stamping Co.*, 247 App. Div. 895 (2d Dept. 1936) (The plaintiff bought a coffee urn, manufactured by the defendant, from a retailer. While the urn was filled with a boiling liquid, and the plaintiff was taking it off the stove, the handle broke, severely injuring the plaintiff's hand. His recovery was sustained by the Court of Appeals with Crane, C. J., dissenting).

⁵⁷ *Cohen v. Brockaway*, 240 App. Div. 18, 268 N. Y. Supp. 545 (1st Dept. 1934) (The plaintiff was injured as the result of a defective door handle on an automobile which was due to the fault of the manufacturer. The defendant's motion to dismiss the complaint was sustained on the ground that a door handle with the defect was not of such a dangerous nature as would bring the case under the doctrine of *MacPherson v. Buick*.)

⁵⁸ *Block v. Liggett & Myers Tobacco Co.*, 162 Misc. 325, 296 N. Y. Supp. 922 (1937) (The plaintiff sought to recover damages sustained in consequence of having smoked a cigarette manufactured by the defendant which had a steel blade imbedded in it. The court found against the plaintiff on the ground that the defect complained of was not likely to cause substantial harm or place life and limb in danger.)

turer liable for the defective handle on a coffee urn. In the coffee urn⁵⁹ case, as in the case of the concealed pin,⁶⁰ there were substantial injuries resulting, and the articles were of such a nature as were likely to be dangerous to life and limb when defective. In the cigarette case,⁶¹ and the door handle case,⁶² the probability of substantial harm resulting was relegated to a mere possibility, and the courts were reluctant to grant recovery in such instances. We have already noted that theoretically, at least, the cases on the subject may be reconciled. If we are to include the practical difficulties which attorneys encounter when cases of this type are theirs to prepare and try, we are not likely to find the seeming inconsistencies ironing themselves out so readily.

The general rule, in regard to the burden of proof in negligence actions, is that it rests on the plaintiff, who is required to establish his case by a preponderance of the evidence.⁶³ More often than not, in cases of this kind, the plaintiff's attorney finds considerable difficulty in acquiring such proof. The plaintiff may easily prove that the injuries sustained were the result of the defect in the chattel caused by the negligent manufacturer. This he does generally by attempting to show that the manufacturer failed to use the necessary tests or, if he did so, that the tests failed to ascertain the defect. Most manufacturers of any size of importance protect themselves by using reasonable tests so that the only way the plaintiff can establish their negligence is by proof that the tests in this particular case failed to find the defect. It is obvious that proof of this nature is difficult, and is rendered even more difficult by the fact that the defective chattel, which was the result of the plaintiff's injury, is generally only one of many thousands which were manufactured, which was permitted to leave the factory in a defective condition.

In addition, there is authority for the view that negligence is not established by showing that an injury might have been avoided by the use of a device which has not been generally adopted.⁶⁴ There are also decisions which hold that where the device is one which would

A cigarette containing an explosive substance which burst forth in the plaintiff's face was held to be a defect dangerous to life and limb in *Meditz v. Liggett & Myers Tobacco Co.*, reported in the N. Y. L. J. of Feb. 7, 1938, at p. 635, col. 7. For a discussion of these two cases and the recent cases on relevant topics see the *Meditz* case.

⁵⁹ *Hoenig v. Central Stamping Co.*, 247 App. Div. 895 (2d Dept. 1936).

⁶⁰ *La Frumento v. Kotex*, 131 Misc. 314, 226 N. Y. Supp. 750 (1928).

⁶¹ *Block v. Liggett & Myers Tobacco Co.*, 162 Misc. 325, 246 N. Y. Supp. 922 (1937).

⁶² *Cohen v. Brockaway*, 240 App. Div. 18, 268 N. Y. Supp. 545 (1st Dept. 1934).

⁶³ *EDGAR AND EDGAR, LAW OF TORTS* (1936) § 17.

⁶⁴ *Pulliam v. Miller*, 108 Neb. 442, 187 N. W. 925 (1922). For the difficulties of proof in these cases see *Meditz v. Liggett & Myers Tobacco Co.*, N. Y. L. J. of Feb. 7, 1938, at p. 635, col. 7.

have prevented the injury, or which has been adopted by a few manufacturers, it may be negligence to fail to use such improved methods.⁶⁵

The true standard of care is that of the ordinary, prudent man. Consequently, where there is evidence that the omission or practice is negligent, it should remain an open question as to whether or not the manufacturer was exercising ordinary care in failing to adopt a well-known, but little-used device which would have prevented the injury.

Courts have come to a realization of the difficulties which beset the plaintiff in these actions, and their gradual tendency has been to shift a portion of the burden of proof to the defendant, by requiring the latter to explain the care it used in the manufacture.⁶⁶

We are not prepared to say, however, on the basis of the few cases in point, that *res ipsa loquitur* is supplanting the necessity for the plaintiff's proving his case, but rather that courts are gradually becoming more lenient in permitting cases to go to the jury when the plaintiff has not, by early standards at least, borne the entire burden of proof.⁶⁷

These practical difficulties bring to mind the challenge that is hurled at the law of torts with increasing regularity: that fault is an outmoded and inadequate criterion of liability, and that the real question is one of distributing all the risks of the defective chattels on those best able to prevent the defects, and to redistribute the ultimate liability through insurance and increased prices.

In order to effect such a departure from our present-day standards of tort liability in this connection three changes from existing law would be required: (1) the imposition of absolute liability for defective chattels upon the manufacturer; (2) the abolition of the consumer's common law remedy and the substitution of a fixed award by a board similar to that now involved in actions falling within the scope of the Workmen's Compensation Acts; and (3) the requirement that all manufacturers carry insurance.

⁶⁵ Kilbride v. Carbon Dioxide & Magnesia Co., 200 Pa. 552, 51 Atl. 347 (1902).

⁶⁶ Freeman v. Schultz Bread Co., 100 Misc. 528, 163 N. Y. Supp. 396 (1917), in which the court said, "I think it was the duty of the defendant to show what care it had used in the manufacture of that loaf [of bread], the process of manufacture * * * so that the court could determine whether it had used that degree of care which would have exempted it from liability if, notwithstanding that care shown in its manufacture, a nail did find its way into the loaf."

This case may be distinguished from one involving a defective ladder, in which courts have generally held the plaintiff to a higher burden in connection with proof of his case. See Miller v. Steinfeld, 174 App. Div. 337, 160 N. Y. Supp. 800 (3d Dept. 1916), where the court said, "Mere proof that the accident happened and that the plaintiff suffered injury was not of itself sufficient to render the doctrine of *res ipsa loquitur* applicable."

⁶⁷ For a discussion of *res ipsa* in general see Note (1936) 11 ST. JOHN'S L. REV. 280.

Certainly we cannot say that the changes contemplated here are imminent. They are suggested as a possible means through which the delay and expense of redress may be mitigated, and the consumer protected, assuming, of course, that such protection is desirable.

The public has, by banding together into various purchaser organizations, gone far in solving the problem of protecting the consumer.⁶⁸ The remaining solutions, if there are to be any, are in the hands of the legislature.

EDYTHE R. DUCKER.

THE PROPOSED FEDERAL LEGISLATION ON MINIMUM WAGES AND HOURS.

Regardless of its political sanction, the modern philosophy is concerned with the most good for the most people.

"Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due rights; but the changed social, economic and governmental conditions and ideas of the time, as well as the problems which the changes have produced, must also logically enter into the considerations, and become influential factors in the settlement of problems of construction and interpretation."¹

The power conferred upon Congress "to regulate commerce with the foreign nations and among the several states * * *" ² was first discussed by the Supreme Court in the case of *Gibbons v. Ogden* ³ on March 2, 1824.

One hundred and thirteen years later a new import was given to the interstate commerce clause when the Black-Connelly Bill ⁴ was introduced to provide for the establishment of fair labor standards in employments in and affecting interstate commerce.⁵

⁶⁸ Soule, *Consumer Protection* (1921) 4 ENCYC. SOC. SCI. 282.

¹ *Borgnis v. Falk Co.*, 147 Wis. 327, 349-350, 133 N. W. 209 (1911), per Chief Justice Winslow.

² U. S. CONST. ART. III, § 8.

³ 9 Wheat. 1, 6 L. ed. 23 (U. S. 1824).

⁴ 75th Cong., 1st Sess., Union Calendar No. 535, S. 2475, REP. NO. 1452 (Aug. 2, 1937, in the House of Representatives).

⁵ In what may be considered as groundwork to this Bill, President Roosevelt's message to Congress on May 24, 1937, declared: "One third of our population, the overwhelming majority of which is in agriculture or industry, is ill-nourished, ill-clad, and ill-housed. * * *. Today you and I are pledged to take further steps to reduce the lag in the purchasing power of industrial